

**Department of  
Veterans Affairs**

# Memorandum

Date: May 19, 2000

VAOPGCPREC 6-2000

From: General Counsel (022)

Subj: Nature of Manual Provisions Concerning Claims Involving Rheumatic Heart Disease

To: Chairman, Board of Veterans' Appeals (01)

## **QUESTION PRESENTED:**

Do certain provisions of paragraph 11.18d.-f. in Veterans Benefits Administration (VBA) Adjudication Procedure Manual M21-1 (Manual M21-1), Part VI, pertaining to claims involving rheumatic heart disease constitute regulations which are binding on the Department of Veterans Affairs (VA)?

## **DISCUSSION:**

1. This issue arises in the context of an order issued by the United States Court of Veterans Appeals (now the United States Court of Appeals for Veterans Claims (CAVC)) vacating a decision of the Board of Veterans' Appeals (Board) to the extent it denied the appellant a rating in excess of 10 per-cent for service-connected rheumatic heart disease. The CAVC granted a joint motion for remand for consideration of paragraph 11.18d.-f. of VBA Manual M21-1, Part VI, regarding claims involving rheumatic heart disease. You have requested our opinion as to whether portions of the manual provisions in question constitute substantive regulations that must be followed by the Board. <sup>1</sup>

2. Section 7104(c) of title 38, United States Code, provides that, "[t]he Board shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, <sup>2</sup> and the precedent opinions of the chief legal officer of the Department." See also *Young v. Brown*, 4 Vet. App. 106, 109 (1993) (VA may not ignore its own regulations). Section 19.5 of title 38, Code of Federal Regulations, provides that, "[t]he Board is not bound by Department manuals,

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<sup>1</sup> The specific provisions referenced in the opinion request are paragraph 11.18d., e., and f.(2), and the introductory text of paragraph 11.18f. Accordingly, this opinion does not address paragraph 11.18f.(1) and (3).

<sup>2</sup> "Instructions of the Secretary" is a term of art refer-ring to a specific class of published documents providing instructions for implementation of newly enacted legislation prior to issuance of regulations. VAOPGCADV 5-89 (O.G.C. Advis. 5-89); VAOPGCPREC 7-92 (O.G.C. Prec. 7-92).

circulars, or similar administrative issues” in its review of VA decisions. The question which must therefore be addressed is whether the provisions of paragraph 11.18d.-f. of the VBA Manual M21-1, Part VI, constitute “regulations” for purposes of 38 U.S.C. § 7104(c).

3. In many cases, courts have concluded that internal agency issuances, such as manuals and circulars, designed to convey instructions to personnel within an agency concerning procedure and practice, did not constitute binding rules. See, e.g., *Schweiker v. Hansen*, 450 U.S. 785, 789-90 (1981) (Social Security claims manual); *Hoffman v. United States*, 894 F.2d 380, 384 (Fed. Cir. 1990) (Air Force regulation); *Horner v. Jeffrey*, 823 F.2d 1521, 1529-30 (Fed. Cir. 1987) (Federal personnel manual); *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir.), *cert. denied*, 459 U.S. 907 (1982) (VA circulars and handbook). However, certain provisions of VBA Manual M21-1 have been found to contain binding substantive rules. E.g., *Hamilton v. Derwinski*, 2 Vet. App. 671, 675 (1992). Some courts have focused on the intent of the promulgator in inquiring whether an agency statement not published in the Federal Register is a binding rule. See, e.g., *Public Citizen, Inc. v. U.S. Nuclear Regulatory Comm’n*, 940 F.2d 679, 681-82 (D.C. Cir. 1991). However, decisions by the CAVC have emphasized the issue of whether the statements in VA manuals and other internal publications are substantive or interpretative in determining the effect of such statements. See *Morton v. West*, 12 Vet. App. 477, 482 (1999) (citing cases where the CAVC found manual provisions to contain substantive rules), *appeal docketed*, No. 99-7191 (Fed. Cir. Sept. 15, 1999); *Dyment v. West*, 13 Vet. App. 141, 146 (1999).

4. A substantive rule is one which “effect[s] a change in existing law or policy or which affect[s] individual rights and obligations.” *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998). Such a rule “narrowly limits administrative action.” *Fugere v. Derwinski*, 1 Vet. App. 103, 107 (1990) (quoting *Carter v. Cleland*, 643 F.2d 1, 8 (D.C. Cir. 1980)), *aff’d*, 972 F.2d 331 (Fed. Cir. 1992); *Morton*, 12 Vet. App. at 481-82. A rule may be considered substantive where it impinges on a benefit or right enjoyed by a claimant or where its application directly affects whether a claimant’s benefits are to be granted, denied, retained, or reduced. *Dyment*, 13 Vet. App. at 146; *Morton*, 12 Vet. App. at 483; *Fugere*, 1 Vet. App. at 107. In contrast, an interpretative rule “merely clarifies or explains an existing rule or statute.” *Morton*, 12 Vet. App. at 482 (quoting *Carter*, 643 F.2d at 8); see also *Paralyzed Veterans of Am.*, 138 F.3d at 1436. It is not intended to create new rights or duties, “but only reminds affected parties of existing duties.” *Paralyzed Veterans of Am.*, 138 F.3d at 1436 (quoting *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993)); *Dyment*, 13 Vet. App. at 146; *Morton*, 12 Vet. App. at 483.

5. As noted by the CAVC, “substantive rules may confer enforceable rights, while internal guidelines and interpretive statements of a federal agency . . . cannot.” *Morton*, 12 Vet. App. at 482 (citing cases). The CAVC has held that, “[s]ubstantive rules . . . in the VA Adjudication Procedure Manual [M21-1] are the

equivalent of Department regulations.” *Hamilton*, 2 Vet. App. at 675. Provisions of VBA Manual M21-1 have been found by the CAVC to be substantive when they have established an evidentiary threshold for a particular type of claim, *Moreau v. Brown*, 9 Vet. App. 389, 394-95 (1996), *aff’d*, 124 F.3d 228 (Fed. Cir. 1997); *Hayes v. Brown*, 5 Vet. App. 60, 66-67 (1993), *appeal dismissed*, 26 F.3d 137 (Fed. Cir. 1994); *Hamilton*, 2 Vet. App. at 674-75, or necessarily limited administrative action by establishing a prerequisite for establishment of service connection, *Earle v. Brown*, 6 Vet. App. 558, 562 (1994). The CAVC has also held that certain provisions of VBA Manual M21-1 were substantive when they have governed which rating criteria will be applied in a particular claim. *Fugere*, 1 Vet. App. at 107 (the CAVC considered a manual provision dealing with the effect of new rating criteria for hearing loss).

6. In *Morton*, which is currently on appeal to the United States Court of Appeals for the Federal Circuit, the CAVC determined that certain provisions of VBA Manual M21-1 pertaining to development of claims were not substantive rules where they stated “administrative directions to the field containing guidance as to the procedures to be used in the adjudication process” and “d[id] not create rights with respect to specific disabilities.” 12 Vet. App. at 483-84; *see also Flynn v. Brown*, 6 Vet. App. 500, 505 (1994) (circular contained only procedural guidance). Other provisions in VBA Manual M21-1 concerning claim development, however, have been found to be substantive in nature. *Hayre v. West*, 188 F.3d 1327, 1331-32 (Fed. Cir. 1999) (VA had “substantively defined” its obligation to obtain service medical records for claim development purposes in VBA Manual M21-1, Part VI). CAVC case law also indicates that certain provisions in VA manuals regarding claim development with respect to specific disabilities establish procedures which VA is obligated to follow. *Patton v. West*, 12 Vet. App. 272, 282 (1999); *Suttmann v. Brown*, 5 Vet. App. 127, 138 (1993).

7. We also note that, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 552(a)(1), a person generally may not be adversely affected by a matter required to be published in the Federal Register and not so published. Rules of procedure and substantive rules of general applicability are among the matters required to be published. 5 U.S.C. § 552(a)(1)(C) and (D); *see also* 5 U.S.C. § 553(b) (requiring notice of proposed rulemaking in the Federal Register); *Fugere*, 1 Vet. App. at 110 (invalidating VA action which did not observe procedure required by law). Accordingly, manual provisions may not be given binding effect to the extent that they purport to create substantive rules which adversely affect claimants.

8. To sum up the principles pertinent to the issues raised in this opinion request, while the case law is still developing in this area, Federal Circuit and CAVC decisions indicate that a provision in a VA manual constitutes a substantive rule when the provision effects a change in law, affects individual rights and obligations, or narrowly limits administrative action. Substantive provisions in manuals may be considered the equivalent of regulations and confer enforceable

rights on claimants. However, manual provisions may not be given binding effect to the extent that they have a direct adverse effect on claimants. Provisions which establish evidentiary thresholds for particular claims or govern determination of rating criteria will be considered substantive. Manual provisions that merely interpret a statute or regulation or provide general guidance as to the procedures to be used in the adjudication process do not create enforceable rights.

9. We will now examine paragraph 11.18d.-f. of VBA Manual M21-1, Part VI, in light of these principles to determine whether the subject provisions of that paragraph should be considered binding on VA. The first three sentences of paragraph 11.18d. of the VBA manual describe the causes and earliest evidence of rheumatic heart disease. Paragraph 11.18e. of the VBA manual relates accepted medical principles concerning a possible etiological relationship between certain coexisting forms of heart disease. The introductory text of paragraph 11.18f. of the manual clarifies how adjudicators should explain the basis for additional compensation for certain forms of heart disease that develop after the presumptive period following discharge. These provisions do not purport to effect a change in law, or affect a claimant's rights or obligations, nor do they narrowly limit administrative action in adjudication of claims. These provisions merely provide information, clarification, or guidance for consideration by adjudicators in determining claims involving certain forms of heart disease. Therefore, the first three sentences in paragraph 11.18d., paragraph 11.18e., and the introductory text of paragraph 11.18f. of the VBA manual are not substantive in nature.

10. We caution, however, that decisions of the CAVC indicate that the Board may not simply ignore the general information provisions of VA manuals because they are not substantive. In *McGinty v. Brown*, 4 Vet. App. 428, 432-33 (1993), the CAVC vacated and remanded a Board decision which had not addressed relevant considerations included in a VA circular on asbestos-related diseases. The court concluded that, in view of the Board's failure to address these considerations, the Board had failed to provide adequate reasons and bases for its decision as required by 38 U.S.C. § 7104(d)(1). 4 Vet. App. at 433. Similarly, in *Ennis v. Brown*, 4 Vet. App. 523, 527 (1993), the CAVC vacated and remanded a Board decision which had failed to analyze an asbestos-related claim in light of considerations discussed in the VA circular. See also *Nolen v. West*, 12 Vet. App. 347, 351 (1999) (citing *McGinty* and *Ennis* in upholding a Board decision as to adequacy of reasons and bases where the Board had extensively reviewed the criteria contained in the asbestos circular in light of the evidence). These cases indicate that relevant factors such as those discussed in the first three sentences of paragraph 11.18d. of VBA Manual M21-1, Part VI, and paragraph 11.18e. of that manual must be considered and addressed by the Board in assessing the evidence regarding a rheumatic-heart-disease claim in order to fulfill the Board's obligation under 38 U.S.C. § 7104(d)(1) to provide an adequate statement of the reasons and bases for a decision.

11. The last sentence of paragraph 11.18d. provides: "With a history of rheumatic fever in service, an aortic valve insufficiency that manifests some years later without other cause shown will be service connected." This provision purports to create a new right for veterans and could prove determinative of a veteran's claim for service connection based upon the development of a specific heart condition under certain circumstances. This manual provision necessarily limits administrative action because it essentially directs adjudicators to award service connection in a particular instance, i.e., where a claimant with a history of rheumatic fever in service seeks service connection for an aortic valve insufficiency that manifests some years after service, where another cause is not shown. It is "more than a mere procedural guideline," rather, "it affect[s] a substantive right." *Fugere*, 1 Vet. App. at 107. Based on the above-referenced case law, we believe that the last sentence of paragraph 11.18d. of the VBA manual should be regarded as substantive and binding on VA.

12. Paragraph 11.18f.(2) of VBA Manual M21-1 states the conclusion that, if verified rheumatic heart disease has been demonstrated, the effect of subsequent onset of certain coexisting forms of heart disease cannot be dissociated and directs adjudicators, under such circumstances, to evaluate the combined cardiac disability as one entity under the rheumatic-heart-disease rating code. It directs adjudicators to treat disability possibly resulting from different conditions as one entity for rating purposes. This paragraph narrowly limits adjudicators' action and may directly affect the rights of claimants in that by requiring rating of combined cardiac disability as one entity it could affect the disability rating assigned to a veteran. For this reason, we believe paragraph 11.18f.(2) should be regarded as substantive. However, it should not be treated as binding to the extent it may adversely affect a veteran by requiring that a particular veteran's cardiac disability be evaluated as one entity, where separate consideration of heart muscle changes and congestive failure following the onset of hypertensive or arteriosclerotic heart disease might produce a higher evaluation. In such a case, if the combined cardiac disability is to be evaluated as one entity, the Board cannot merely rely on the directive language of paragraph 11.18f(2), but must adequately explain the reasons and bases for the decision.

**HELD:**

The last sentence of paragraph 11.18d. of Veterans Benefits Administration Adjudication Procedure Manual M21-1, Part VI, regarding claims involving rheumatic heart disease, should be considered substantive and binding on the Board of Veterans' Appeals. Paragraph 11.18f.(2) of that manual should also be considered substantive. However, it should not be treated as binding to the extent it may adversely affect a veteran by requiring that a particular veteran's cardiac disability be evaluated as one entity, where separate consideration of heart muscle changes and congestive failure following the onset

of hypertensive or arteriosclerotic heart disease might produce a higher evaluation. The introductory text of paragraph 11.18f., paragraph 11.18e., and the first three sentences of paragraph 11.18d. of that manual are not substantive. However, the relevant factors discussed in the first three sentences of paragraph 11.18d. and in paragraph 11.18e. must be considered and addressed by the Board of Veterans' Appeals in assessing the evidence regarding a claim involving rheumatic heart disease in order to fulfill the Board's obligation under 38 U.S.C. § 7104(d)(1) to provide an adequate statement of reasons and bases for a decision.

Leigh A. Bradley